In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1587

NATHAN STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 437 F. 2d 775.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1971 and a petition for rehearing was denied on March 2, 1971 (Pet. App. C). The petition for a writ of certiorari was filed on April 16, 1971, and is thus out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

425-819—71

QUESTIONS PRESENTED

1. Whether sufficient evidence supports petitioner's conviction for wilfully attempting to evade income taxes for 1963.

2. Whether the trial court committed prejudicial error in permitting testimony concerning an event allegedly remote in time, in limiting the cross-examination of certain government witnesses, or in admitting in evidence a summary of petitioner's reconstructed income and tax liability.

3. Whether certain of the jury instructions were prejudicially erroneous.

STATEMENT

Petitioner was indicted in two counts for wilfully attempting to evade his income tax for the years 1962 and 1963, in violation of Section 7201 of the Internal Revenue Code of 1954. After a jury trial, he was acquitted as to the 1962 count, and convicted as to the 1963 count. The court imposed a fine of $2,500 plus costs and a prison sentence of one year (App. 645–646).[1] The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

Petitioner was engaged in the meat wholesale business in Indianapolis, Indiana (App. 165). He employed an accountant to keep his books and prepare his returns, both on a cash basis. The accountant worked only with figures supplied by petitioner, which he did not independently verify (App. 27–30, 35).

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[1] "App." references are to the Appendix for Apellant in the court of appeals.

Revenue agents examined petitioner's books in 1964, and sought to reconstruct his income by the bank deposits method. For 1963, they found total deposits and cash expenditures of $394,668.11 (App. 636). The agents reviewed their figures with petitioner, and obtained his help in identifying all deposits that did not represent income items (*e.g.*, App. 129, 130, 134–139, 176, 232–234). All such non-income items were then thoroughly investigated (App. 175).

The non-income items totaled $18,428.12. This amount, along with petitioner's business expenses (cost of goods sold and operating expenses) and various exclusions, exemptions, and deductions, was subtracted from the total deposit and cash expenditure figure (App. 134, 255, 262, 636). The resultant amount, $40,545.13, was petitioner's reconstructed taxable income under the government's computations (App. 637–638). Petitioner reported on his 1963 return only $1,833.90 in taxable income, almost $39,000 less than the government's computations indicated (App. 262).

Petitioner advised the agents that he determined his business income from his sales invoices (App. 122). He reported various totals to his accountant, who then prepared his tax return without seeing the invoices (App. 122–123). The invoices were not available for inspection by the agents (App. 53); petitioner claimed that a fire in his office in April 1965 had destroyed them (App. 123, 164, 391).[2] Thus at trial there was

[2] Petitioner asserted that he offered the invoices to the agents, but that they had not examined them when the fire occurred (see Pet. App. A-2).

no direct evidence concerning petitioner's income. A former employee, Gerald Waterman, testified that in March or April of 1962 petitioner discussed his federal income taxes with him. According to Waterman, petitioner related that his earnings were quite good. In reply to Waterman's remark concerning the adverse tax consequences of this, petitioner stated that that did not worry him and that he would have no hesitancy, with the assistance of his accountant and attorneys, about "cheating the Government as well as I would cheat anybody else, which includes my help, my customers". (App. 206–209.)

The government rested on the basis of the bank deposits computation and Waterman's testimony. Petitioner testified in his own behalf, seeking to show that most of the understatement established by the government's computations resulted from additional non-income deposits and good faith errors (Pet. App. A–3). He also introduced a net worth computation of his income, under which taxable income for 1963 was approximately $4,000, rather than the more than $40,000 found by the government's bank deposits method (*ibid.*). Finally, he denied that the conversation about which Waterman testified took place (Pet. App. A–2).

ARGUMENT

Petitioner's contentions turn on the particular facts of his case. They were carefully considered and rejected by the court below. There is no reason for further consideration by this Court.

1. Petitioner asserts that his conviction is not supported by sufficient evidence. He argues that the government's uncorroborated bank deposits computation

was not sufficient to show that he had unreported income for 1963 (Pet. 5–9); that there was insufficient evidence of wilfullness (Pet. 9–11); and that there was no evidence of where he filed his 1963 tax return (Pet. 11–13) or of how much tax he paid that year (Pet. 13).

The bank deposits method utilized by the government is a proper method of establishing unreported income. See *United States* v. *Frank,* 245 F. 2d 284, 287 (C.A. 3), certiorari denied, 355 U.S. 819; *United States* v. *Doyle,* 234 F. 2d 788 (C.A. 7), certiorari denied, 352 U.S. 893. That method was correctly applied here. Petitioner's claims that some non-income items were not deducted (Pet. 6) are without substance. His self-serving assertions concerning additional non-income items were matters for the jury. The government's proof made clear that every effort was made to identify and eliminate all of these items. While the government necessarily could not establish the exact income, it established a substantial amount of unreported income, which amply supports this element of petitioner's offense. See *Holland* v. *United States,* 348 U.S. 121, 138; *United States* v. *Johnson,* 319 U.S. 503, 517.[3]

[3] Petitioner's reference to the fact that the government's bank deposits showing was not corroborated (Pet. 6) is irrelevant. No such corroboration is required. See *Stinnett* v. *United States,* 173 F. 2d 129 (C.A. 4), certiorari denied, 337 U.S. 957; *Gleckman* v. *United States,* 80 F. 2d 394 (C.A. 8), certiorari denied, 297 U.S. 709. Moreover, petitioner himself provided corroboration in his purported reconstruction of his income by the net worth method. That method, after necessary adjustments, also showed a substantial amount (approximately $35,000) as petitioner's 1963 taxableincome (see App. 567–569, 636–643; Pet. App. A–5—A–7).

Similarly, sufficient evidence supports the jury's conclusion that petitioner wilfully sought to evade his taxes by not reporting all of his income. While the substantial amount of unreported income by itself indicated wilfullness, there was also direct proof of this in Waterman's testimony.

Petitioner's claim concerning where he filed his return is, contrary to his assertion (Pet. 13), only a challenge to the venue of his trial. Again, ample circumstantial evidence supports the jury's decision on this issue, as the court below held (Pet. App. A–7). Finally, while there was no proof of the taxes petitioner actually paid for 1963, this was not an element of the offense charged—evasion of the proper tax assessment. See *Sansone* v. *United States,* 380 U.S. 343, 354.

2. Petitioner's claims of procedural error in the conduct of the trial are all without merit. The testimony of the witness Waterman concerning his conversation with petitioner was plainly relevant to the case. The trial court correctly concluded that the conversation was not, as petitioner contends (Pet. 14–15), excludable because it was too remote. The conversation occurred in the spring of 1962, some nine months before the year in question and only two years before petitioner filed his 1963 return (App. 206–209). The trial court had broad discretion as to this matter, and there was no abuse of that discretion in admitting this testimony.[4] See *Mitchell* v. *United States,* 213 F.

[4] Petitioner's assertion (Pet. 22–25) that the government knowingly used "tainted testimony" of witness Waterman is simply not so. The government sought to buttress an already

2d 951, 958 (C.A. 9), certiorari denied, 348 U.S. 912.

Nor did the trial court unduly restrict the cross-examination of government witnesses, as petitioner charges (Pet. 15–17). The court sought only to limit the trial to matters arguably relevant. Indeed, much of the evidence that petitioner complains he was unable to elicit on cross-examination was developed in later direct testimony, when the same witness was called by the defense (App. 336–361, 363–365). The cross-examination of Waterman was largely unfettered, and the trial court did not exceed its discretion in those instances where it sustained government objections. See *United States* v. *Allegretti,* 340 F. 2d 254, 258 (C.A. 7), certiorari denied, 381 U.S. 911.

The court's admission of the government's summary of income as reconstructed by the bank deposits method (Govt. Ex. 44) was not improper, as petitioner states (Pet. 17–21). As discussed above, the bank deposits method utilized by the government was an appropriate means of establishing petitioner's actual income. See *Holland* v. *United States, supra,* 348 U.S. at 131–132. The government's summary of its computations was correctly proffered for consideration by the jury. See *United States* v. *Johnson, supra,* 319 U.S. at 519–520.

3. Petitioner's final assertion (Pet. 26–30) is that the trial court erred in instructing the jury that in its consideration of petitioner's reconstruction of his income by the net worth method, capital losses, if any, incurred by petitioner during 1963 should be added

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strong case against petitioner with testimony from Waterman which it believes was true; it was for the jury to decide whether or not it was.

to net worth. This was correct, since nondeductible items are added to actual net worth under this method. Cf. *Holland* v. *United States, supra,* 348 U.S. at 125. Moreover, the amount of such losses for 1963 ($514.93) was not significant to the government's case and thus, as the court below concluded, any error on this score would be nonprejudicial (Pet. App. A-8).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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